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No. 71-1206

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In the Supreme Court of the United States

OCTOBER TERM, 1971

ROBERT BOLIVAR DE PUGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530

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After a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted on nine counts of having possessed unregistered firearms in violation of 26 U.S.C. 5861(d). He was sentenced to concurrent prison terms of ten years. The court of appeals affirmed with a lengthy opinion which discusses petitioner's various conten-

tions. 452 F. 2d 915; Pet. App. We treat here only those matters not fully covered in the opinion below.[1]

Petitioner's attack on the validity of his arrest is without merit. The return of an indictment by a grand jury in the State of Washington established probable cause for the arrest of petitioner. The case of *State* v. *Miller*, 76 N.M. 62, 412 P. 2d 240, on which petitioner relies involved a warrant based on a complaint found not to be supported by probable cause, an entirely different situation.

The affidavit for a search warrant challenged by petitioner (a copy of which we have lodged with the clerk of this Court), amply established probable cause to search the relevant premises for weapons. The affidavit showed that, pursuant to an indictment charging them with conspiracy to commit several armed bank robberies in the State of Washington, petitioner and another person were apprehended near a house where petitioner and his associates had previously been seen; that at the time of arrest petitioner and his companion had three loaded weapons; that explosive devices had been found in premises previously occupied by petitioner and his associates in New Mexico. The affidavit also showed that after full warn-

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[1] The court of appeals, on whose opinion we rely, found (Pet. App. A14) that in the circumstances of this case the failure to appoint advisory counsel for petitioner, who insisted on conducting the trial himself, did not constitute an abuse of discretion on the part of the trial court. The brief for the United States in the court of appeals, a copy of which we are filing with the clerk, sets forth in detail (pp. 27-32) the portions of the transcript in which petitioner and the court discussed representation by counsel.

ings had been given to petitioner, he was asked how the occupants of the premises would dispose of the weapons there, and he said that they would probably take them to Missouri; and that when told that the F.B.I. had considered a surprise raid on the premises, petitioner said that they probably would have been killed. The affidavit further showed that no weapons were registered in the names of the occupants of the house, thus supplying probable cause that possession of the weapons would be unlawful.

The affidavit also recited that, when arrested, petitioner was asked whether he had booby traps or dynamite in the residence he had just left and was warned that, if any one was hurt, he might be responsible. Petitioner stated that the house was not booby trapped when he left but that the people in the house were capable of booby trapping it. He also said that the occupants had rifles and were trained to use them. These are the statements which petitioner claims must be disregarded because of insufficient warnings. The court of appeals properly held that, even without this information, the facts recited in the other portions of the affidavit (summarized in the preceding paragraph), concerning which there is no claim of illegal source, were sufficient to establish probable cause.

Petitioner's contention that the search and seizure were invalid because items were seized which were not specifically mentioned in the warrant is without merit. There was no general search. The other items seized—*i.e.*, literature illustrating the use of destruc-

tive devices; photographs and testimony describing the materials from which destructive devices are made; and a tape recording entitled "Improvised Weapons"—were all encountered during the search and were closely related to the firearms and destructive devices specified in the warrant. The courts of appeals have consistently sustained the seizure in such circumstances of articles not enumerated in a search warrant. *E.g.*, *Gurleski* v. *United States*, 405 F. 2d 253, 256-260 (C.A. 5), certiorari denied *sub nom. Smith* v. *United States*, 395 U.S. 977; *Sanders* v. *United States*, 238 F. 2d 145 (C.A. 10); see also *Anglin* v. *Director, Patuxent Institution*, 439 F. 2d 1342 (C.A. 4), certiorari denied, 404 U.S. 946.

Petitioner's claim (Pet. 14-15) that the prosecuting attorney actively assisted a proposed defense witness (Mr. Peyson) in asserting the Fifth Amendment privilege against self-incrimination, knowing that the witness had no privilege because he had pleaded guilty to the same charges in another district, is without basis. Mr. Peyson pleaded guilty in the Western District of Missouri to a three-count information which did not embrace the numerous charges which could be made against him were he to admit possession of the various firearms here involved, or admit his presence at the house at Williamsburg, New Mexico, which was searched.[2] Moreover, petitioner, who conferred at

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[2] Peyson did not, as petitioner asserts (Pet. 14), plead guilty to "count one of the indictment"; rather he pleaded guilty to a separate information which charged him with possession of only one of the silencers and the grenade in-

length with Peyson shortly prior to calling him as a witness (Tr. 637), was undoubtedly aware of Peyson's earlier plea of guilty yet made no objection to Peyson's invocation of the privilege (Tr. 638-641). The prosecuting attorney's remark to the judge in chambers in petitioner's presence that Peyson's attorney should be present when petitioner interviewed him was thus no "charade" and, we submit, was by no means improper (Tr. 553-554).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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volved in the indictment on which petitioner was tried. In addition to other federal charges which were not encompassed by Peyson's plea, his testimony could have incriminated him under state law.

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